

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
Appeal No.469 of 2006
In
Chamber Summons No.1565 of 2005
In
Execution Application Nio.357 of 2005
In
Summary Suit No.3659 of 2003

Prabhakar Mehta Appellant
(Orig. Defendant)
V/s.

Subodh Shety Respondent
(Orig. Plaintiff)

Mr.F. D'Vitre with Mr.Zal Andhyarujina i/by
M/s.Maneksha & Sethna for appellant.

Mr.Sanjay Jain with Mr.P.P.Kulkarni for
respondent.

**CORAM : H.L. GOKHALE &
V.R. KINGAONKAR, JJ.**

DATED : 31st July 2006

P.C. :

1. Heard the learned Counsel for the parties.

2. The appellant before us is the defendant in Summary Suit No.3659 of 2003. The respondent herein filed that suit for claiming the unpaid part of his contracted amount consisting of the principal amount of Rs.5,04,284/- with interest totalling to Rs.8,28,196.57. The respondent had entered into a contract with the appellant herein for supply of cashew kernels from Mumbai to U.S.A.

It is the case of the respondent that the payments were made as per the contract from time to time. Only this part of the amount remained to be paid and since that was not so paid, the Suit was filed.

3. It is the case of the respondent (original plaintiff) that the Summons for Judgment and all necessary processes were served on the appellant. The appellant did not claim the packet when sent for service and, therefore, the ex-parte decree came to be passed by a Single Judge of this Court on 28th September 2004. The appellant took out a Notice of Motion for setting aside that decree which is pending before the Single Judge. Apart therefrom, he took out a Chamber Summons for a declaration that the decree was nullity and that the warrant of attachment issued in pursuance of the ex-parte decree be set aside. It is this Chamber Summons which has been dismissed by the Single Judge by the impugned order dated 7th February 2006 and hence, the present Appeal.

4. Mr.D'Vitre, learned Counsel appearing for the appellant, submitted that the respondent did not obtain leave under Clause 12 of the Letters Patent of this Court and the Court did not have the jurisdiction to try and entertain the Suit

and, therefore, the resultant decree was a nullity. This point had been raised before the

learned Single Judge. The grievance of Mr.D'Vitre is that the learned Judge has not gone into this aspect. He relied upon a Division Bench judgment of this Court in **Devidatt Ramniranjandas vs. Shriram Narayandas** reported in **34 BLR page 236** and particularly the judgment of Rangnekar, J. therein to the effect that leave under Clause 12 affords the foundation to the Court's jurisdiction and it must be obtained before institution of the Suit or else, the Court will not have the jurisdiction. Mr.D'Vitre has very fairly drawn our attention to a judgment of the Apex Court (which has been relied upon by the respondent) in the case of **Hira Lal Patni vs. Sri Kali Nath** reported in **AIR 1962 S.C. 199**. In that case the decree was transferred from Bombay to Agra for execution. The submission taken in execution was that the decree granted by the Bombay High Court was a nullity and that the Court should not have granted leave which had been granted in the facts of the case. Mr.D'Vitre tried to distinguish the judgment by contending that in that case the leave had been granted and, therefore, on facts, the situation was a different one. In any case, what

the Apex Court has observed in later part of paragraph 4 of that judgment is very relevant for our purpose. Therein the Court has observed that if the subject matter is wholly foreign to the jurisdiction of the Court, it was another matter and then one could contend lack of jurisdiction but not otherwise. The observation is to the following effect:-

" The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it."

5. Though we have noted the submissions of Mr.D'Vitre on the judgment relied upon by the

respondent, in the facts of this case it is not necessary to go into this aspect for the simple reason that the plaintiff has clearly averred in the plaint that the contract had been entered into between the parties in Mumbai and the payment was to be made in Mumbai and that the shipment had been made from Mumbai. Mr.D'Vitre referred us to the contract document which states that the port of dispatch was Cochin and that the payments were to be made from Bank of America in U.S.A. by the appellant herein on receipt of the consignment. What is, however, material to note is that in the reply to the Chamber Summons, the plaintiff has clearly stated that all the payments were received by the Bank of Maharashtra in Mumbai which is the banker of the respondent mentioned in the contract. It is also stated that the goods were dispatched from Mumbai and undoubtedly, the contract had been signed in Mumbai. There is no rejoinder to this averment in paragraph 10 of the reply. Though the suit is decreed exparte, the Appellant had an opportunity to deny this averment by filing a rejoinder which he has not availed. As stated earlier, it has been the case of the plaintiff that barring this last payment of Rs.5,04,284/-, all payments had been received for the earlier consignments in Mumbai. That being

so, in our view, the mention of port of loading as Cochin in the invoice cannot take away the effect of the assertions made by the plaintiff in the affidavit in reply that the goods were shipped from Mumbai. Similarly as far as the receipt of the payment is concerned, it has been specifically averred by the plaintiff that the payments were throughout received in Mumbai by the Bank of Maharashtra, the banker of the respondent-plaintiff. There is no counter to this aspect in the rejoinder. This being so, in our view, the learned Judge was not in error in dismissing the Chamber Summons on facts, though he has not stated specifically that leave under Clause 12 was not necessary. The fact, however, remains that the cause of action entirely arose in Mumbai and that is why the Chamber Summons has been dismissed on the facts of the case.

6. Under the circumstances, the Appeal is dismissed. We make it clear that the observations made in this order are concerned with deciding the Appeal against the order on the Chamber Summons. As far as the Notice of Motion to set aside the ex-parte decree is concerned, that will be decided by the concerned Single Judge on its own merits.

7. An ad-interim stay has been granted by an

earlier Division Bench on 12th July 2006 whereby the further steps in execution were stayed. Mr.D'Vitre appearing for the appellant prays that the same ad-interim protection be continued for six weeks. Mr.Jain appearing for the respondent opposes the prayer. Even so, with a view not to cause prejudice to the appellant, we extend the stay for six weeks.

(H.L. GOKHALE, J.)

(V.R. KINGAONKAR, J.)